United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1044 B

P/J

To be argued by
LLOYD I. ISLER

United States Court of Appeals

For The Second Circuit

74-1044

GEORGE J. WEINER, JR.,

Plaintiff-Appellant,

—against—

PAUL MATSCHINER, MICHAEL KULUKUNDIS, CALLIOPE KULUKUNDIS, DONALD L. KUBA, JOSEPH ROSENTHAL, RAM BROADCASTING CORPORATION, RAM BROADCASTING OF CALIFORNIA, INC., RAM BROADCASTING OF COLORADO, INC., RAM BROADCASTING OF CONNECTICUT, INC., RAM BROADCASTING OF FLORIDA, INC., RAM BROADCASTING OF INDIANA, INC., RAM BROADCASTING OF LOUISIANA, INC., RAM BROADCASTING OF MASSACHUSETTS, INC., RAM BROADCASTING OF MICHIGAN, INC., RAM BROADCASTING OF MISSOURI, INC., RAM BROADCASTING OF NEVADA, INC., RAM BROADCASTING OF NEW MEXICO, INC., RAM BROADCASTING OF OHIO, INC., RAM BROADCASTING OF OREGON, INC., RAM BROADCASTING OF SOUTH CAROLINA, INC., RAM BROADCASTING OF TEXAS, INC., and RAM BROADCASTING OF WASHINGTON, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

LLOYD I. ISLER,
Attorney for Plaintiff-Appellant,
405 Lexington Avenue,
New York, N. Y. 10017

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Statement

Plaintiff appeals from an order of the District Court (S.D. N.Y., Pierce, D.J.) dated December 3, 1973 (35a-

37a),* which dismissed the first four counts of a five count complaint.

The District Court decided (23a-34a) that the first count, alleging an oral agreement, was barred by the statute of frauds; that the second and third counts must fall because (i) though pleading actions in tort, they "are bottomed on the unenforceable oral agreement" pleaded in the first count, and (ii) they are barred by a three-year statute of limitations; and that the fourth count is barred by a one-year statute of limitations.

It is plaintiff's respectful submission that the District Court's views and conclusions with respect to each of these counts of the complaint are in error and should be reversed.

Questions Presented

1. Is not the agreement sued upon in the first count, one under which neither party was *bound* to do anything at any time and consequently not within the statute of frauds?

2. Did not the District Court err in construing the second and third counts as causes based upon "inducing a breach of contract" and so subject to a three-year statute of limitations?

3. Did not the District Court err in construing the fourth count as one based upon "injury to reputation", and so subject to a one-year statute of limitations?

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* Unless otherwise indicated: (a) parenthetical numerical references throughout this brief are keyed to the pages of the Appendix; likewise, (b) emphasis and interpolations in quoted materials herein are supplied.

Facts

Plaintiff, an expert in the communications business who was employed by the New York Telephone Company since 1945, brings this action to recover for the several wrongs set forth in five separate counts of the complaint.

Central to the first three counts (4a-21a) is an agreement made in 1965 whereby the defendant Paul Matschiner (hereafter "Matschiner"), who desired to enter into the communications business, agreed that if plaintiff would guide him in connection with his proposed entry into that business, by rendering technical advice and acting as consultant, he [Matschiner] would give plaintiff five per cent of the capital stock of any corporation that he [Matschiner] would organize or cause to be organized to engage in the communications business, and of which he [Matschiner] would be a shareholder (5a-6a).

Plaintiff rendered such advice and guidance and in 1967 Matschiner organized a corporation known as World Communications Corporation (hereafter "World"), of which Matschiner was a substantial shareholder*. Pursuant to their agreement, Matschiner, in 1968, issued and delivered to plaintiff a certificate for 5% of World's capital stock (6a).

Plaintiff subsequently rendered further technical advice and consultant's services in connection with other areas of the communications business, in which Matschiner was interested, relating to radio common carriers. In 1969, Matschiner caused a corporation known as Ram Broadcasting Corporation (hereafter "Ram") to be organized to engage in that specific area and branch of the com-

* World undertook the business of developing and manufacturing a direct dial portable telephone housed in an attache case.

munications business. In an apparent attempt to deprive plaintiff of 5% of Ram's capital stock, Matschiner attempted to conceal his shareholding interest in Ram. Thus he caused all of Ram's shares to be issued in the name of the defendant Calliope Kulukundis, mother of the defendant Michael Kulukundis, to whom he had divulged the nature and details of his relationship with plaintiff (8a-9a).

The first three counts of the complaint center around the foregoing facts. In the first and second counts, plaintiff seeks a judgment directing the issuance and delivery to him of a certificate of Ram's shares equal to 5% of its outstanding capital stock. The third count seeks recovery of damages occasioned by the individual defendants' fraudulent conduct in concealing Matschiner's stockholding interest in Ram so as to deprive plaintiff of a 5% shareholding interest therein.

The fourth count rests on a different set of facts.

After World was organized, Matschiner falsely stated and represented to Dun & Bradstreet that plaintiff was a "director" of World. It is plaintiff's claim that Matschiner, having a substantial financial interest in World, wished to gain greater acceptance of World in the communications business. Hence, he inspired the belief, through his false statement to Dun & Bradstreet, that plaintiff's expertise, acumen and services were committed to World by reason of his serving as a "director" thereof (11a-12a).

Matschiner's statement, published by Dun & Bradstreet, came to the attention of the New York Telephone Company which had employed plaintiff for twenty-three years. Believing it to be true, the New York Telephone Company summarily terminated plaintiff's employment on the

ground that his acting as a "director" of World constituted a conflict of interest (12a-13a).

Thus, plaintiff not only lost his position with the New York Telephone Company and the pension rights that flowed and would flow from his 23 years of uninterrupted service to that company, but he was also unable to gain equivalent employment in the United States and was obliged to relocate in Puerto Rico therefor (11a-13a). Plaintiff, in this count, seeks recovery from Matschiner for the damages sustained by reason of his tortious use of plaintiffs name.

The claim asserted in the fifth count stems from other unlawful uses of plaintiff's name by all of the defendants.

It is alleged therein that Matschiner and the other named defendants made unlawful use of plaintiff's name for trade purposes, in violation of the Civil Rights Law, in that they falsely stated and represented to the United States Federal Communications Commission that plaintiff was a full time employee of various Ram subsidiaries, which had filed applications for licenses to operate the radio common carriers acquired through Ram, and that plaintiff would supervise the operations of such carrier stations. The defendants, it is further alleged, submitted to the Federal Communications Commission in connection with such applications, a resume of plaintiff's background, training and expert qualifications—to assure favorable action on the applications and so gain the required Federal Communications Commission licenses.

The District Court dismissed the first four counts of the complaint but denied the motion to dismiss the fifth count.

Plaintiff appealed from the dismissal of the first four counts (80a) and the defendants appealed from the Court's denial of their motion to dismiss the fifth count. Defendants subsequently withdrew their appeal.

POINT I

The agreement sued upon in the first count is not within the statute of frauds.

It is alleged, in the first count, that in the latter part of 1965, the defendant Matschiner and an associate wished to enter into and engage in business relating to the communications industry. They thus solicited the advice and expertise of the plaintiff—a recognized expert and authority in that field (5a). It is then alleged that:

> "it was agreed that plaintiff would receive from the defendant Matschiner, in return for guiding said defendant in his proposed entry into the communications business and for his services as technical advisor and consultant, five (5%) per cent of the capital stock of any corporation that said defendant would organize or cause to be organized to engage in the communications business and of which he would be a shareholder and that plaintiff would be reimbursed for expenses incurred in connection with such services" (5a-6a).

Plaintiff did thereafter guide Matschiner as technical advisor and consultant and Matschiner, two years later, organized a corporation known as World Communications Corporation to engage in the communications business and in which he had a shareholding interest. Pursuant to their agreement, Matschiner issued and delivered to plaintiff a certificate for fifteen shares of World's stock, representing 5% of World't total capital stock (6a).

Plaintiff thereafter was called upon for further technical advice and guidance relating to Matschiner's interest in the radio common carrier aspect of the communications business. In or about September 1969, Matschiner organized or caused to be organized another corporation, the defendant

Ram, for the purpose of engaging in that area of the communications business (6a).

It is finally alleged that defendant Matschiner "is the record or beneficial owner" of 50% of Ram's outstanding shares, is the President, Treasurer and a Director thereof, but that he has failed to issue or deliver the Ram shares to plaintiff, pursuant to their agreement. Since the Ram shares cannot be obtained on the open market, plaintiff seeks a judgment directing the issuance and delivery of such shares (7a).

The District Court, in granting the motion to dismiss the first count, was of the opinion that the agreement sued upon is a "permanent arrangement of indefinite duration" and that since it is "not in writing [it] is voided by the New York statute of frauds" (25a).*

It has been held by the New York Court of Appeals that the Statute of Frauds (General Obligations Law § 5-701 (1)) applies only to agreements:

> "which *by their terms* do not admit of performance within one year from the time of their making and if performance be possible within the year, however unlikely or improbable that may be, the agreement does not come within the proscription of the statute (See, *e.g.*, Trustees of First Baptist Church v. Brooklyn Fire Ins., Co., 19 N.Y. 305; Warren Chemical & Mfg. Co. v. Holbrook, 118 N.Y. 586; Blake v. Voigt, 134 N.Y. 69; Ward v. Hasbrouck, 169 N.Y. 407)" (emphasis in text)
>
> *Nat Nal Service Stations* v. *Wolf*, 304 N.Y. 332, 335-336.

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* Defendants relied on Uniform Commercial Code § 8-319 as well as on General Obligations Law § 5-701(1). The District Court's decision rests on the latter statute.

The agreement alleged here, as in *Nat Nal* v. *Wolf*, *supra*, is clearly one at will. It does not *by its terms* "of necessity extend beyond one year from the time of its making" since neither party was obligated, thereunder, to do anything.

The District Court, it is respectfully submitted, erred in failing to distinguish between agreements such as was alleged in *Martocci* v. *Greater N. Y. Brewery*, 301 N.Y. 57, cited by the District Court (25a), and agreements which the New York Court of Appeals has consistently held do "not come within the proscription" of the statute of frauds.

In *Nat Nal* v. *Wolf*, *supra*, the parties agreed that so long as plaintiff purchased from the Socony or Standard Oil Companies its requirements for gasoline through the defendants and the defendants accepted the same, the defendants would pay to the plaintiff an amount equal to the discount allowed to defendants by the Socony or Standard Oil Companies.

In deciding that the agreement there pleaded did not fall within the Statute of Frauds, the New York Court of Appeals stated:

> "The agreement alleged here was clearly one at will and for no definite or specific time and thus by its terms did not of necessity extend beyond one year from the time of its making. It is clear from the complaint and affidavit that neither party obligated itself to do anything. Unless and until plaintiff had offered to place an order for gasoline and the defendants had accepted such offer and filled the order, only then did there come into existence a legal obligation, viz., the obligation of defendants to pay the agreed

discount. The promise by defendants to allow plaintiff a discount on purchases by plaintiff if made through them did not obligate plaintiff to buy its gasoline requirements through defendants. The plaintiff could have purchased the same gasoline through someone other than defendants. On the other hand if the plaintiff placed an order the defendant was under no obligation to accept it. Neither party was obligated to deal with the other. Each time the plaintiff offered to buy gasoline from defendants and the defendants accepted the offer and sold gasoline, there was concluded a separate contract and there became due from defendants the discount specified, but neither party was ever obligated to enter into another such contract. * * * In reality the plaintiff is suing to recover the discounts due from *a series of completed and executed, independent contracts.* When defendants accepted an order placed by plaintiff they became bound to grant the discount. The acceptance of an order conferred upon plaintiff the right to the discount and imposed upon defendants the duty to pay it to plaintiff. Until and unless an order was offered by plaintiff and accepted by defendants, neither party had any rights or duties. As has been indicated above by the terms of the alleged oral agreement defendants could at any time refuse to accept an order and thereby avoid payment of a discount. On the other hand plaintiff was not obligated at any time to place any orders with the defendants. * * *

"We are confronted with an alleged contract by the terms of which neither party was bound to do anything at any time, and consequently there is nothing in its terms to bring it within the Statute of Frauds" (pp. 336-337).

In the agreement alleged herein, as in *Nat Nal* v. *Wolf, supra,* neither plaintiff nor Matschiner obligated himself to do anything. Unless and until plaintiff furnished the expert advice and technical guidance as to the particular matter then involved and the defendant accepted such advice and acted upon it in causing a corporation to be organized to engage in that particular area of the communications business, and of which he was a shareholder, no legal obligation came into existence, *viz.*, Matschiner's obligation to issue to plaintiff 5% of the capital stock of such newly organized corporation.

The promise by Matschiner to issue to plaintiff 5% of the capital shares of any such corporation did not obligate plaintiff to render technical advice and guidance to Matschiner. On the other hand, even if plaintiff rendered technical advice and guidance to Matschiner, Matschiner was under no obligation to accept it and organize a corporation to engage in such business.

Hence, as in the case of *Nat Nal* v. *Wolf, supra,* the agreement did not bind either party "to do anything at any time and consequently there is nothing in its terms to bring it under the statute of frauds."

In relying upon *Martocci* v. *Greater N. Y. Brewery, supra,* the District Court failed to note the different character of the agreement there involved. Indeed, the Court of Appeals in *Nat Nal* v. *Wolf, supra,* noted that significant difference (pp. 337-340):

> "The cases of *Martocci* v. *Greater New York Brewery* (301 N.Y. 57) and *Cohen* v. *Bartgis Bros. Co.* (264 App. Div. 260, affd. 289 N.Y. 846) referred to below are not to the contrary. In both those cases the allegations in the complaints set forth contracts binding upon the parties for indefinite periods of time. In neither case was any party given the right

to terminate the contractual relationship. In the *Martocci case* (pp. 60-61) the complaint, as amended, alleged an oral agreement, later supplemented by writings, whereby '*in consideration of the introduction* of the defendant by plaintiff' to a large and well-known corporation, defendant agreed 'to pay the plaintiff a commission of five (5%) per cent on all sales made by the defendant' to such corporation and paid for by it. The contract had been fully executed by the plaintiff and there was nothing further for him ever to do. * * *

* * *

"In both the *Martocci* and *Cohen* cases *(supra) the plaintiff salesmen had executed their parts of the respective contracts.* In the *Martocci* case the plaintiff's performance constituted the introduction of the defendant to the customer, and in the *Cohen* case the plaintiff performed his part of the contract by having procured the customer for the defendant. In both those cases the performance by the respective plaintiffs under the alleged oral agreement constituted the consideration necessary to impose a binding obligation upon the defendants to carry out their part of the contracts, in accordance with their promises, by paying the plaintiffs commissions on all sales to the customers whenever made. * * * In neither the *Martocci* case nor the *Cohen* case could the defendant escape contractual obligation to the plaintiffs to pay commissions upon sales to the customer procured by the plaintiff. The plaintiff's right to commissions in those two cases was not dependent upon any act of the plaintiffs or the defendants, as here, but was wholly dependent upon the act of the third party, the procured customer. Any time the customer placed an order which the defendants were in good faith bound to accept they had to pay the plaintiffs

the commission called for. If the customer did not place an order until more than a year after the contract was entered into the defendants would still be under a contractual obligation to pay the plaintiffs their commissions on any subsequent orders. The defendants could not avoid their contractual obligations by refusing to accept orders from the customers procured by the plaintiffs. * * *

* * *

"Here, neither party has, nor is it possible for them under the terms of the alleged agreement, to furnish consideration through performance which will bind the other party for a period beyond the offering and acceptance of a particular order. Plaintiff need never perform at all. If plaintiff chooses to perform by placing an order the defendants are not bound to accept it. If defendants perform by acceptance of an order they do not bind themselves as to any future order. It is clear that each order and acceptance is a separate contract and that the parties herein have *performed and executed* a series of contracts." (emphasis in text).

In the language of the New York Court of Appeals, hereinabove quoted, "it is clear" that "each" instance of plaintiff's further guidance of Matschiner and rendition of technical advice to him in connection with a proposed new business venture in the communications business *"is a separate contract"* which, if acted upon by Matschiner in the setting up of a new corporation of which he was a shareholder, obligated Matschiner to deliver to plaintiff 5% of the shares of such newly created corporation. The parties herein have, as in *Nat Nal* v. *Wolf*, *supra*, "performed and executed a series of contracts". Hence, the agreement sued upon is not within the statute of frauds.

POINT II

The second and third counts are not barred by the statute of frauds or the statute of limitations.

A. A determination by this Court that the agreement sued upon is not barred by the statute of frauds must lead to the re-instatement of the second and third counts—since the District Court's dismissal thereof turns initially on its view that the agreement is void under the statute of frauds (27a-28a).

B. The District Court's second reason for dismissing these counts—the statute of limitations—evolves from the view that plaintiff is pleading "the traditional tort of inducing a breach of contract" (28a).

No such allegations of "inducing breach of contract" are to be found in the second or third counts. Rather, plaintiff plainly alleges that the defendants Matschiner and Kulukundis agreed to organize Ram to engage in the business which Matschiner's advice and guidance had impelled and that they

> "planned, schemed, conspired and agreed to conceal from the plaintiff the fact that Matschiner had a shareholding interest in the defendant Ram for the purpose of depriving plaintiff of the shares of the capital stock of said defendant Ram and to which plaintiff was entitled under the aforesaid agreement between plaintiff and defendant Matschiner"

by causing all of Ram's shares to be issued in the name of Kulukundis' mother, Calliope (9a).*

* The agreement entitled plaintiff to shares of "any corporation that [Matschiner] would organize or cause to be organized to engage in the communications business *and of which* [*Matschiner*] *would be a shareholder*". The issuance of the shares in Calliope's name, bespeaks the truth of the allegation in the complaint.

Hence, the second and third counts plead a "conspiracy" and deliberate and intentional scheme to deprive plaintiff of a 5% shareholding interest in Ram—which is governed by a 6-year statute of limitations—rather than a cause of action based on "inducing a breach of agreement" which is governed by a 3-year statute.

POINT III

The cause of action pleaded in the fourth count is not subject to a one-year statute of limitations.

It is alleged in the fourth count that defendant Matschiner's statement, to Dun & Bradstreet, that plaintiff was a "director" of World was false, that Matschiner knew it was false when made and that as a result of the publication of that false statement, plaintiff was discharged by the New York Telephone Company, after 23 years of continuous employment, on the ground that plaintiff was holding a position which "conflicted" with his obligations to it (12a-13a).

The District Court, while acknowledging that the count may be read "as one based on defendant Matschiner's tortious wrong" rather than a pleading of a violation of the right of privacy under the Civil Rights Law, concluded that such a "reading . . . is of no assistance since the gravamen of the action would still be *injury to reputation* and such an action must be brought within the one year period" (30a).

It is respectfully stated that nowhere in the pleading of the fourth count is it alleged that plaintiff suffered "injury to reputation". Rather, it is specifically alleged that the defendants' acts resulted in plaintiff's *loss of employment*, that had continued for 23 years, that he also lost his pension rights and was further unable to gain other equivalent employment in the United States (13a).

Hence, the fourth count is governed by a *six-year* statute of limitations (CPLR 214, subd. 5).

CONCLUSION

The order appealed from should be reversed to the extent of reinstating the first, second, third and fourth counts of the complaint.

Respectfully submitted,

LLOYD I. ISLER
Attorney for Plaintiff-Appellant

Service of One (1) Copy of the within Brief is admitted this 20th day of March 1974

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